84-1458

Office - Supreme Court, U.S.
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MAR 9 1985
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

October Term, 1984

ALAN CHESLER and SHEILA CHESLER,
Appellants,

vs.

STADLER ASSOCIATES, INC.,
Appellee.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALLAN H. APPLESTEIN, Esquire
Attorney for Appellants
7600 Red Road
South Miami, Florida 33143
Telephone: (305) 666-5957

QUESTIONS PRESENTED

I.

WHETHER THE CONDUCT OF THE SELLING BROKER AMOUNTED TO A WAIVER OF HER RIGHT TO A COMMISSION UPON DEFAULT UNDER THE PURCHASE AND SALE AGREEMENT.

II.

WHETHER THE LISTING BROKER WAS AN AGENT OF THE SELLING BROKER FOR PURPOSES OF SIGNING THE AGREEMENT WHICH WAIVED THE REAL ESTATE COMMISSION AND WHETHER THE SIGNING OF THAT AGREEMENT WAS WITHIN HER AUTHORITY AS SUCH AGENT.

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CITATION TO THE OPINION BELOW

This Petition relates to the opinion of the United States Court of Appeals for the Eleventh Circuit, attached hereto.

JURISDICTION

The attached Judgment was entered on February 11, 1985, with no rehearing requested. Jurisdiction is conferred upon this Court by 28 U.S.C.A. §1254.

STATEMENT OF THE CASE

This is a case involving a contract for the sale and purchase of real property. On February 24, 1980, Plaintiff, EMPIRE CORPORATION, agreed to purchase real property located at 6520 S.W. 114th Street in Miami, Florida, from the Defendants, ALAN CHESLER and SHEILA CHESLER (Record, Page 9). The purchase price was $535,000.00 and Plaintiff made a deposit under the contract of $53,500.00. The listing broker for the contract was Defendant, Stadler Associates, Inc. Contemporaneously with the aforesaid Purchase and Sale Contract, Defendants, SHEILA CHESLER and ALAN CHESLER and Defendant, South Dade Realty, Inc. by its agent, Joan Grady, signed a handwritten addendum to the contract providing that the real estate commission would be waived in the event the purchaser breached the contract and forfeited the deposit (Record, Page 243). Plaintiff, EMPIRE CORPORATION, did not close under the aforesaid Purchase and Sale Agreement.

On June 20, 1980, Plaintiff, EMPIRE CORPORATION, filed suit in the United States District

Court for the Southern District of Florida suing Defendant sellers, ALAN CHESLER and SHEILA CHESLER, Defendant brokers, South Dade Realty, Inc., and Stadler Associates, Inc., and Defendant escrow agent, Bank of Florida, requesting rescission, return of the deposit, and damages. (Record, Page 1). The Complaint alleged misrepresentations by Defendants concerning square footage and also failure to deliver an abstract, which allegations would have excused Plaintiff's failure to perform and close. Subsequently, crossclaims were filed between the Defendants concerning entitlement to the deposit in the event of Plaintiff's default. Plaintiff's Complaint was dismissed on April 14, 1983, for failure to assert the proper party Plaintiff and to comply with the Court's Order to Compel Discovery (Record, Page 198). Trial was then held between the remaining Defendants as to entitlement to the deposit.

Pursuant to the aforesaid contract for Purchase and Sale, sellers/Defendants, ALAN CHESLER and SHEILA CHESLER, were entitled to one-half of the deposit upon buyer's default. The issue was whether Defendants, CHESLER, were entitled to the remaining half of the deposit which would otherwise have gone to the brokers, as a result of the handwritten addendum to the Contract, (copy attached).

Trial was held before the Honorable Joe Eaton on April 11, 1984. The court entered a Final Judgment on June 27, 1984, (Record, Page 279), (copy attached). The Final Judgment provided that Defendants, ALAN CHESLER and SHEILA CHESLER, were entitled to an additional 25% of the deposit, that 25% representing the broker commission which would otherwise have gone to Defendant, South Dade Realty, Inc. The court

then ruled that the remaining 25% of the deposit would go to Defendant, Stadler Associates, Inc. and not Defendants, SHEILA CHESLER and ALAN CHESLER. Defendants, ALAN CHESLER and SHEILA CHESLER, filed a Notice of Appeal on July 16, 1984, appealing the portion of the Final Judgment awarding 25% of the deposit to Defendant, Stadler Associates, Inc. (Record, Page 281).

The issue for review is first whether the trial judge erred in applying the law as to whether Roaslie Elliott's failure to speak out constituted a waiver of her commission, and second, whether the trial judge erred in his legal conclusion that an agency was not established between the selling and listing brokers, or that such agency did not encompass the authority to sign the commission waiver agreement.

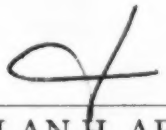
The basis for federal jurisdiction of this case in the United States District Court was diversity.

The reason for allowance of the Writ is that this case involves an important legal question and a factual decision which is clearly erroneous.

The copy of the original Judgment of the United States District Court is attached hereto.

CERTIFICATE OF SERVICE

I CERTIFY that copy hereof has been served by mail upon LAURA L. RUSSO, Attorney for Appellee, this 6 day of March, 1985.



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Appendix

[FILED JUN 27 1984]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1630-Civ-JE

EMPIRE CORPORATION

Plaintiff,

vs.

ALAN CHESLER, et al.,

Defendants.

FINAL JUDGMENT

THIS ACTION came on for trial on April 11, 1984 before the Court, Honorable Joe Eaton, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, and a hearing on the parties' Motions to Tax Attorney's Fees having been held on June 19, 1984,

IT IS ORDERED AND ADJUDGED:

1. The Court hereby adopts and incorporates the findings of fact and conclusions of law announced by the Court at the trial of this case on April 11, 1984, and the record thereof is made a part of this judgment.

2. That as to the Cross-Claim by South Dade Realty, Inc. to 25% of the deposit at issue in this cause,

said claim be and the same is hereby denied and the Cross/Plaintiff South Dade Realty, Inc. take nothing, that the Cross-claim of South Dade Realty, Inc. be dismissed on the merits and that the Cross/Defendants ALAN CHESLER and SHEILA CHESLER recover from the Cross/Plaintiff South Dade Realty, Inc. their costs of this action including an attorney's fees in the amount of $2,750.00.

3. That as to the Cross-Claim of Stadler Associates, Inc. to 25% of the deposit at issue in this cause, that the Cross/Plaintiff Stadler Associates, Inc. recover on its Cross-Claim a sum equal to 25% of the initial deposit at issue in this case plus the interest accrued thereon and recover from the Cross-Defendants SHEILA and ALAN CHESLER the costs of its action including an attorney's fee in the amount of $3,500.00.

4. That ALAN CHESLER and SHEILA CHESLER recover on their Cross-Claim a sum equal to 75% of the initial deposit at issue in this case plus the interest accrued thereon.

DONE and ORDERED in Chambers, Miami, Dade County, Florida, this 27 of June, 1984.

/s/ Joe Eaton

U.S. DISTRICT COURT JUDGE

cc: Lawrence R. Metsch, Esquire
Stephen H. Broudy, Esquire
Rex E. Russo, Esquire
Richard E. Reckson, Esquire
Bruce Charles King, Esquire
Jeffrey Allen Tew, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5541
Non-Argument Calendar

EMPIRE CONSTRUCTION,
Plaintiff-Counter-Claim Defendant,

versus

ALAN CHESLER and SHEILA CHESLER,

Defendants-Cross-Claim
Defendants-Counter-Claim
Plaintiffs-Appellants,

SOUTH DADE REALTY, INC.,
Defendant-Cross-Claim Plaintiff,

STADLER ASSOCIATES, INC.,

Defendant-Cross-Claim
Plaintiff-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 11, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

~~The~~ controlling issues in this case pose questions of fact: (1) did the selling broker by her actions waive the right to a commission; and (2) did the listing broker's waiver constitute a waiver of the selling broker's commission? Either of these questions could probably have been answered in the affirmative by the trier of fact without being clearly erroneous. The record does not compel an affirmative answer, however, and the trial judge's decision to the contrary is not clearly erroneous on the record before this Cout.

Therefore, the judgment of the district court is due to be affirmed without opinion under our Circuit Rule 25.

AFFIRMED.

On this 24th day of February, 1982, it is agreed by Joan Grady, both individually & as agent for Smith Grady Realty Co, that in consideration for Sheila Chesler executing an oblivious unacceptable contract offer of even date, to buyers corporation, to assign any & all of the rights & duties to deposit (in event of forfeiture by Buyer) to said Sheila Chesler and Alan Chesler jtly.

Witness
Sherry Chesler

Joan M Grady
Joan Grady

Sheila Chesler

Smith Grady Realty
by Joan M Grady
Joan Grady Agent

BEST AVAILABLE COPY

Dft Chesler's Comm
SO 4/21/80

STANDARD SALES CONTRACT FORM – CORAL GABLES BOARD OF REALTORS

THIS IS A LEGALLY BINDING CONTRACT FOR SALE AND PURCHASE

REALTOR

PARTIES: ALAN CHESLER and SHEILA CHESLER, as SELLER

and EMPIRE CORPORATION AND/OR ASSIGNS, as BUYER

hereby agree that Seller shall sell and Buyer shall buy the following real property upon the terms and conditions set forth below and on the reverse side hereof.

I. LEGAL DESCRIPTION: Lot 7, Block 1, HAMMOCK PINES ESTATES, according to to the plat thereof, Plat Book 84, Page 84, of the Public Records of Dade County, Florida, together with the improvements situate thereon. Also included are all built-in fixtures & equipment located with and about said improvements, wall-to-wall carpeting, window treatments, range, refrigerator-freezer, dishwasher, washer & dryer, security system. Exclude: light fixture in foyer, needlepoint carpet in child's bedroom.
(If personal property is being sold, items shall be detailed above or detailed inventory shall be attached.)

II. STREET ADDRESS: 6520 S. W. 114th Street, Miami, Florida 33156

III. PURCHASE PRICE AND METHOD OF PAYMENT: $ 535,000.00
The sum of $ 1,000.00 is herein deposited with Stadler Associates, Inc. Escrow Account

Purchaser shall increase the deposit to a total of 10% of the purchase price by March 1, 1980

Purchaser shall assume existing mortgage with Citizen's Federal, which mortgage has a balance of approximately $62,173 at an interest rate of 7% per annum, payable $857 Monthly including amortization of principal and interest, plus escrow for estimated taxes and insurance.

Balance in cash at closing, of which the deposits above referred to shall be a part.

IV. TIME FOR ACCEPTANCE: If this contract is not executed by both parties hereto on or before Feb. 25, 1980 any funds deposited in escrow by Buyer shall, at the option of Buyer, be returned to him and this offer shall thereafter be null and void. The date of contract shall be the date when the last one of the Seller or Buyer has signed this contract.

V. EVIDENCE OF TITLE: Within 60 days from the date of this contract, Seller shall at his expense deliver to Buyer or his attorney an abstract of title in accordance with Standard A on reverse side.

VI. CLOSING DATE: This transaction shall be closed on or before July 2, 1980 and is controlled by other provisions of this contract.

VII. PRORATIONS AND ESCROW BALANCE: Taxes, mortgage guarantee insurance, interest, rents and other expenses and revenue of said property shall be prorated as of midnight of the day preceding date of closing. Seller shall receive as credit at closing an amount equal to the escrow funds held by the mortgagee, which funds shall thereupon be transferred to Buyer.

VIII. CONVEYANCE: Seller shall convey title to the real property to Buyer by Statutory Warranty Deed free and clear of all encumbrances, liens, easements, taxes, assessments, mortgages, mechanics, petroleum and road rights-of-way, whether in favor of an individual or governmental unit, but subject to matters contained in paragraph IX following. Personal property shall be conveyed by absolute bill of sale.

IX. RESTRICTIONS AND EASEMENTS: Buyer shall take title subject to (a) Zoning, restrictions imposed by governmental authority, (b) Restrictions and matters appearing on the plat or otherwise common to the subdivision, (c) Public utility easements of record, provided said easements are located on the side or rear lines of property, (d) Taxes for year of closing, assumed mortgages and purchase money mortgages, if any, (e) Other
Seller warrants that, at the time of closing, there shall be no violation of building or zoning codes.

X. ESCROW CLOSING: The cash proceeds of sale shall be held in escrow by Seller's attorney for not more than 5 business days to allow deed to be recorded and abstract continued at expense of Buyer, to show title in Buyer free of intervening title objections attributable to Seller from date of last continuation. If Buyer's attorney shall fail to notify Seller's attorney within such period of any such objections, Buyer will be deemed to have accepted the title as is. Buyer shall be entitled to possession of the premises upon delivery of the escrow funds to Seller. If a portion of the purchase price is to be derived from institutional financing, the requirements of such institution as to place, time, and procedures for closing and for disbursement of mortgage proceeds shall control, anything in this Contract to the contrary notwithstanding.

XI. TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Typewritten or handwritten provisions inserted in this form or attached hereto as Addenda shall control all printed provisions in conflict therewith. No agreements or representations unless incorporated in this contract shall be binding upon any of the parties hereto.

XII. SPECIAL CLAUSES:

WITNESSES: (Two are required)
Rosalie H. Elliott

Executed by Buyer on the 24th day of February, 19 80
(SEAL)
(SEAL)

WITNESSES: (Two are required)

Executed by Seller on the 20th day of Feb., 19 80
(SEAL)
(SEAL)

Deposit received on February 24, 1980 subject to the conditions of this contract, if check subject to collection.

By Stadler Associates, Inc.
(Broker (Type or Print))

By Rosalie H. Elliott
(Escrow Agent)

BEST AV

STA[illegible]ARDS FOR REAL ESTATE TRANSACTION[illegible]

A. **EVIDENCE OF TITLE**: Seller shall provide a complete abstract of title brought current by an existing abstract firm (if not existing, then certified as correct by an existing firm) purporting to be an accurate synopsis of the instruments affecting the title to subject real property recorded in the public records of the county to the date of this contract showing in Seller a marketable and insurable title in accordance with the standards adopted from time to time by the Florida Bar subject only to: (a) taxes for the year of closing; (b) restrictions, easements, limitations and conditions of record imposed by governmental authority; (c) restrictions and matters appearing on the plat or otherwise common to the subdivision; (d) outstanding oil, gas and mineral rights of record without right of entry; (e) zoning and other governmental regulations; and (f) such other exceptions as may be specified elsewhere in this contract. Buyer shall have 15 days from date of receipt of abstract to examine same. If title is found defective, Buyer shall notify Seller in writing specifying the defects. If said defects render the title unmarketable, Seller shall have 120 days from receipt of such notice to cure the defects, and if after said period Seller shall not have cured the defects, Buyer shall have the option of either (1) accepting the title as it then is or (2) demanding a refund of all moneys paid hereunder which shall forthwith be returned to Buyer and thereupon Buyer and Seller shall be released of all further obligations hereunder. Seller agrees that he will, if title is found to be unmarketable, use diligent effort to correct the defects in the title within the time herein provided therefor, including the bringing of any suits, if necessary.

B. **EXISTING MORTGAGES**: Seller shall obtain and furnish a statement from the mortgagee setting forth the principal balance, method of payment, interest rate, and whether the mortgage is in good standing. If there is a charge for the change of ownership records by the mortgagee, it shall be borne equally by the parties. If the mortgagee does not accept Buyer for purposes of assuming the existing mortgage, where the mortgage instrument requires such acceptance, or if mortgagee increases the rate of interest, Buyer at his option may cancel the contract and all moneys paid on the purchase price shall be refunded to him.

C. **PURCHASE MONEY MORTGAGES**: A purchase money mortgage shall provide for mortgagee against loss by fire with extended coverage in an amount not less than the total outstanding mortgage balances or 80% of the insurable value, whichever is greater, in a first mortgage, the note and mortgage shall provide for acceleration, at the option of the holder, after 30 days default and in a second mortgage after 15 days default. Second mortgage shall require the owner of the property encumbered by said mortgage to keep all prior to and encumbrances in good standing and forbid the owner of the property from accepting modification of, or future advances under a prior mortgage. Buyer shall have the right to prepay all or any part of the principal at any time or times with interest to date of payment without penalty, unless otherwise provided for in Paragraph III hereof.

D. **SURVEY**: Buyer, within the time allowed for delivery of abstract and examination thereof, may have said property surveyed at his expense. If the survey shows any encroachment on said property or that the improvements presumed to be located on the subject property in fact encroach on the lands of others, or violate any of the covenants herein, the same shall be treated as a title defect.

E. **TERMITE INSPECTION**: At least ten days prior to closing, at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed exterminator stating that there is no evidence of live termite or other wood boring insect infestation on said property nor substantial damage from prior infestation on said property. If there is such evidence, Seller shall pay up to one percent (1%) of the purchase price for the treatment required to remedy such infestation, including repairing and replacing of portions of said improvements which have been damaged. However, if the cost for such treatment or repairs exceed one percent (1%) of purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

F. **ROOF INSPECTION**: At least ten days prior to closing, at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct a leak or to replace damage to facia or soffit, Seller shall pay up to two percent (2%) of the purchase price for said repairs which shall be performed by a licensed roofing contractor. However, if the cost for such repairs exceed two percent (2%) of purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

G. **INSURANCE**: The premium on any hazard insurance policy in force covering improvements on subject property shall be prorated between the parties of the policy may be cancelled at Buyer's option. If insurance is to be prorated, Seller shall on or before closing date furnish to Buyer all insurance policies or copies thereof.

H. **LEASES**: Seller shall furnish copies of all written leases to Buyer within 7 days after date of contract and if there are any persons in possession without written lease, or subject to the terms such persons specifying the nature and duration of the occupancy shall be furnished Buyer by Seller prior to the closing date.

I. **MECHANICS LIENS**: Seller shall furnish to Buyer at time of closing an affidavit attesting to the absence of any claims of lien or potential lienors known to Seller.

J. **EXPENSES**: State, [illegible] and documentary stamps and the cost of recording any corrective instruments shall be paid by Seller. Documentary stamps to be affixed to the note secured by the purchase money mortgage, intangible tax on the mortgage and the cost of recording the deed and purchase money mortgage shall be paid by the Buyer.

K. **PRORATION OF TAXES**: Taxes shall be prorated based on the current year's tax with due allowance being made for the maximum discount and for homestead or other exemptions if allowed for said year. If the closing occurs at a date when the current year's assessment is not fixed, and the current year's assessment is available, taxes will be prorated based upon such assessment and the prorate will be final. If the current year's assessment is not available, then taxes will be prorated on the prior year's tax, provided however, if there is a change in the exemptions affecting the subject property for January 1st of the year of closing, which improvements were not assessed on January 1st of the prior year, then taxes shall be prorated in an amount to be agreed upon between the parties. However, any tax prorations based on an estimate made at the request of either party to subsequently adjusted upon receipt of tax bill, and a statement to that effect shall be set forth in the closing statement.

L. **SPECIAL ASSESSMENT LIENS**: Certified, confirmed and ratified special assessment liens as of the date of closing are to be paid by Seller. Pending liens as of the date of closing shall be assumed by Buyer, provided however that where the improvement has been substantially completed as of the date of the contract, such pending liens shall be considered as certified, confirmed and ratified and Seller shall at closing be charged an amount equal to the last estimate by the public body of the assessment for such improvement.

M. **OTHER INSPECTIONS**: Not later than 15 days prior to closing Buyer may inspect all appliances, air conditioners and heating systems, electrical systems, plumbing, machinery, sprinklers and pool mechanical equipment, included in the sale. Seller shall pay for necessary repairs to place such items in working order at time of closing.

N. **RISK OF LOSS**: If the improvements are damaged by fire or other casualty prior to time of delivery of the deed and can be restored to substantially the same condition as now existing within a period not to exceed 60 days thereafter, Seller may restore the improvements and the closing date and date of delivery of possession hereunder (or pro[illegible] shall be extended accordingly. If Seller fails to do so, Buyer shall have the option of (1) taking the property as is, together with the insurance proceeds, if any, or (2) canceling this contract and all deposits shall be forthwith returned to Buyer and the parties released of any further liability hereunder.

O. **MAINTENANCE**: Between the date of the contract and the date of closing, the property, including lawn, shrubbery and pool, if any, shall be maintained by Seller in the condition [illegible] as of the date of the contract, ordinary wear and tear excepted.

P. **ATTORNEY FEES AND COSTS**: In connection with any litigation arising out of this contract, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees.

Q. **DEFAULT**: If Buyer fails to perform this contract within the time specified, the deposit paid by Buyer may be retained by or for the account of Seller as consideration for the execution of this agreement and in full settlement of any claims for damages, and all parties shall be relieved of all obligations under this contract or offer, at the option Seller may proceed at law or in equity to enforce his legal rights under this contract. If, for any reason other than failure of Seller to render his title marketable after diligent effort, Seller fails, neglects or refuses to perform this contract, Buyer may receive the return of his deposit or may proceed in law or in equity to enforce his legal rights under this contract.

R. **PERSONS BOUND**: The benefits and obligations of the contract shall inure to and bind the respective heirs, personal representatives, successors and assigns of the parties hereto. Wherever used, the singular shall include the plural, the plural the singular, and the use of any gender shall include all genders.

S. **SPECIAL COVENANTS**: Seller represents and warrants (1) that there is ingress and egress to said property over public roads, and (2) that there are no parties in possession other than Seller unless otherwise specified above.

FEE TO BROKER: Seller agrees to pay to the real estate broker named herein as for his services in finding a Purchaser for subject property, a sum equal to 6 % of the gross purchase price at the time of closing this transaction. If Buyer fails to perform and the deposit is retained, the amount of such deposit shall be divided equally between the broker and Seller, provided, however, that the amount to be retained or received by the broker shall not exceed the full amount of the usual commission he would have received by the broker any excess being retained by Seller. If the transaction shall not be closed because of inability of or inability of Seller to perform, Seller shall pay out of, or, full to the broker on demand.

Stadler Associates, Inc. in 50/50 co-op wit
South Dade Realty, Inc.

(Real) Broker

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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 84-1458

(2)

In The
Supreme Court of the United States
October Term, 1984

ALAN CHESLER AND SHEILA CHESLER,
Appellant,

vs.

STADLER ASSOCIATES, INC.,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING THAT THE SELLING BROKER HAD NOT WAIVED ITS RIGHT TO 25% OF THE DEPOSIT.

2. WHETHER THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING THAT NO EVIDENCE OF A LISTING BROKER—SELLING BROKER AGENCY RELATIONSHIP WAS PRESENTED AT TRIAL.

Pursuant to Rule 28.1, the following are affiliates of STADLER ASSOCIATES, INC:

The Stadler Corporation

Stadler Properties, Inc.

South Florida Referral Services, Inc.

Stadler Real Estate School, Inc.

Stadler Mortgage Corporation

Stadler Insurance Agency, Inc.

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STATEMENT OF THE CASE

The underlying transaction in this case was the sale of real property. Sellers - ALAN and SHEILA CHESLER ("CHESLERS") had listed their house for sale with SOUTH DADE REALTY, INC. ("SOUTH DADE"). (T.3). STADLER ASSOCIATES, INC. ("STADLER") found a prospective purchaser for the CHESLERS' house. (T.3).

On February 24, 1980, the CHESLERS attended a meeting at the office of SOUTH DADE. (T.32). At this meeting, STADLER presented to the CHESLERS an all cash offer from EMPIRE CORPORATION ("EMPIRE") for the CHESLERS' house at the listing price of $535,000.00. (T.86). The CHESLERS were reluctant to accept EMPIRE'S offer because of doubts they had concerning EMPIRE'S ability to meet the financial requirements of the contract (T.87).

The last paragraph of the Purchase and Sale Agreement labelled "Fee to Broker" provided that in the event of EMPIRE'S default, EMPIRE forfeited its right to the deposit and the CHESLERS would receive 50% and brokers 50%. (R.10). SOUTH DADE, through sales associate JOAN GRADY volunteered to waive its right to the deposit to be made by EMPIRE should EMPIRE default in its performance. (T.109). ROSALIE ELLIOTT of STADLER did not agree to waive STADLER'S right to the deposit in the event of EMPIRE'S default. (T.109). ROSALIE ELLIOTT left the meeting after forty-five minutes. (T.86). MR. APPLESTEIN, friend of the CHESLERS and an investor, drafted a waiver of deposit agreement after ROSALIE ELLIOTT'S departure. (T.53).

JOAN GRADY signed the waiver agreement as agent for SOUTH DADE. (R.248). The CHESLERS then signed the Purchase and Sale Agreement. (T.22). EMPIRE placed a deposit of $51,700.00 with BANK OF FLORIDA as Escrow Agent. (T.8).

On June 30, 1980, EMPIRE filed suit in U.S. District Court for the Southern District of Florida against the CHESLERS, SOUTH DADE, STADLER and BANK OF FLORIDA. (R.1). EMPIRE alleged that the CHESLERS were in breach of the Purchase and Sale Contract. (R.1).

Defendants, SOUTH DADE and STADLER crossclaimed against Defendants/CHESLERS and Defendant/BANK OF FLORIDA for their 25% shares of the deposit. (R.204,215). EMPIRE'S Complaint was dismissed on April 14, 1982. (R.199).

A non-jury trial was held on the crossclaims of SOUTH DADE and STADLER on April 11, 1984. The trial court entered Final Judgment on June 27, 1984. (R.279-280). SOUTH DADE'S crossclaim was denied. STADLER was awarded 25% of the deposit, plus costs and attorneys fees. Defendant/CHESLERS filed a Notice of Appeal from the award to STADLER on July 16, 1984. (R.281).

The issue for review is whether the trial court clearly erred in its findings of facts that STADLER did not waive its right to the deposit, and that a STADLER-SOUTH DADE agency relationship was not presented at trial. The applicable standard of review is the clearly erroneous standard. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a).

The court of appeals can overturn a trial court's fact finding only if it was left with the definite and firm conviction that such a finding was mistaken. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976).

SUMMARY OF THE ARGUMENT

Appellee's argument for the first issue is that the evidence of record substantiates the trial court's findings of fact. The trial judge had the opportunity to weigh the testimony of the witnesses and to evaluate all of the evidence presented before making his findings of fact. These findings of fact should not be set aside because Appellant has not met his burden of proof showing the findings to be clearly erroneous.

Appellee's argument for the second issue is that the Appellant is precluded from introducing on appeal, an issue that was not presented to the trial court. The trial judge specifically found that Appellant's issue was not presented to him. The facts of record do not support the argument by Appellant.

ARGUMENT

A. The Trial Court Was Not Clearly Erroneous In Finding That Stadler Did Not Waive Its Right To The Deposit.

In his findings of fact, Judge Eaton specifically found that STADLER, through its sales associate ROSALIE

ELLIOTT, did not waive its right to the deposit. (T.109). Appellant, nevertheless, argues that ROSALIE ELLIOTT'S silence at the February 24, 1980 meeting amounts to an acceptance of the waiver agreement.

Appellant's argument is faulty in two respects. First, in order for the court to find a waiver through silence, the court must also find that the trial judge sitting as fact finder was clearly erroneous in his finding that STADLER did not waive its contractual right to the deposit. The trial court had the opportunity to hear the testimony of all the witnesses. An appellate court may not consider evidence de novo, and must be particularly reluctant to disregard a finding based on evaluation of testimony drawing credibility into question. *Matter of Multiponics, Inc.*, 622 F.2d 709, 722-723 (5th Cir. 1980).

Based on the testimony presented, the trial judge found "the effort to establish a waiver through MISS ELLIOTT on the part of STADLER, meaning either that the lady joined in the written contract, the terms of it by oral agreement or reached some similar or other oral agreement to waive simply has not been established by the evidence." (T.109).

The trial court addressed ROSALIE ELLIOTT'S silence, but did not find her conduct amounting to an acceptance under the circumstances.

> COURT: I do not think that the other lady was doing anything but sitting there and observing this fiasco, you understand, as best I can arrive at it, so that there is no way that MR. TEW (CHESLERS attorney) had proved up any meeting of the minds or contractual agreement or joining in with this written contract. (T.107).

The trial judge then concluded that the CHESLERS had not met their burden of proving by a preponderance of the evidence that a contract between STADLER and CHESLER existed.

> COURT: I am talking about the people that were selling this property or trying to sell it have the burden of showing that contract by the preponderance of the evidence, and that is not even close in considering the weight of the testimony before us. (T.109).

The evidence amply supports the trial court's findings, and they should not be disturbed on appeal.

Second, Appellant argues that MISS ELLIOTT'S silence estops STADLER from asserting its right to the deposit or waives its right to the deposit. In support of this argument, Appellant cites two cases, *Richards v. Dodge*, 150 So.2d 477 (Fla. 2d D C A 1963) and *Arbogast v. Bryan*, 393 So.2d 606 (Fla. 4th D C A 1981). Both of these cases stand for the general rule than an estoppel may under certain circumstances be created by silence. To create an estoppel by silence, there must be some duty to speak and some detrimental reliance thereon. *Ennis v. Warm Mineral Springs, Inc.*, 203 So.2d 514 (Fla. 2d D.C.A. 1967), *cert. denied*, 210 So.2d 870. Mere silence or inaction in and of itself will not create an estoppel. *Southernmost Humane Society v. Key West*, 365 So.2d 402 (Fla. 3d D.C.A. 1978). Neither STADLER nor its employee were under any duty to speak at the February 24, 1980 meeting. The Appellant makes no argument that STADLER was under a duty to speak or that the CHESLERS detrimentally relied upon STADLER'S silence.

Arbogast and *Richards* provide no support for Appellant's argument. In *Richards* and in *Arbogast,* the "silences" which led to a waiver were lengthy in duration. In *Richards,* 150 So.2d at 482, a tenant was estopped from asserting a breach of covenant against his landlord because he was deemed to have waived his right by his three month silence. In *Arbogast,* 393 So.2d at 607, a real estate salesman was estopped from asserting that his employment contract was void as against public policy because he was silent for six years and reaped benefits from his silence.

The February 24, 1980 meeting lasted some four hours. (T.69). ROSALIE ELLIOTT left after forty-five minutes. Various aspects of the underlying real estate were discussed before her departure. The trial court specifically found that ROSALIE ELLIOTT did not participate in the conversation concerning waiver of deposit. (T.105). ROSALIE ELLIOTT'S silence was momentary. She did not have a duty to speak. There was no reliance detrimental or otherwise on ROSALIE ELLIOTT'S silence. The CHESLERS, if they relied on anything, relied on the advice of MR. APPLESTEIN, an investor and current husband of SHEILA CHESLER. He was present at the February 24, 1980 meeting (T.61), and authored the waiver agreement. (T.51).

Appellant's argument that STADLER waived its right to the deposit by ROSALIE ELLIOTT'S silence is insufficient on its face because neither duty to speak nor detrimental reliance are shown by the established facts.

B. The Trial Court Was Not Clearly Erroneous In Finding That No Evidence Of An Agency Relationship Between South Dade And Stadler Was Presented At Trial.

Appellant's second argument that SOUTH DADE was acting for STADLER is without support in the record. The trial court specifically stated that this issue had not been presented at trial.

> COURT: The only way in the world that STADLER REALTORS would not be entitled to this would be if in fact under the circumstances of the arrangement SOUTH DADE REALTY does in fact find itself in the position to waive for both parties. This *would require* considerable discussion about the trade, established practices in the trade, *all sorts of presentations which have not been presented, were not raised, not urged and not a part of this situation.* (T.108).

Appellant is precluded from presenting in this appeal the theory that SOUTH DADE was STADLER'S agent. A court of appeal will not consider issues raised for the first time on appeal. *Adams v. Askew,* 511 F.2d 700, 705 n.9 (5th Cir. 1975). A theory not presented to the trial court will not be entertained for the first time on appeal. *Hill York Corp. v. American International Franchises, Inc.,* 488 F.2d 680, 690 (5th Cir. 1971).

Even if this court were to consider Appellant's theory, the facts of record do not substantiate the argument. The fact that ROSALIE ELLIOTT of STADLER and JOAN GRADY of SOUTH DADE cooperated on the real estate transaction does not create an agency relationship.

Appellant asserts that the record shows that JOAN GRADY was put into a position by ROSALIE ELLIOTT of STADLER whereby the CHESLERS would believe

that MISS GRADY'S signature on the commission waiver agreement would also bind STADLER. Appellant, however, fails to state how ROSALIE ELLIOTT put JOAN GRADY in this position, fails to state how and why the CHESLERS believed this, and fails to cite to a particular page or portion of the record to support this statement.

ROSALIE ELLIOTT testified that she had objected to waiving her portion of the deposit (T.92,93,94), and that she left the meeting held at South Dade Realty before the waiver agreement had been drafted, (T.89,90) and was unaware of its existence until the trial. (T.90,99). There was no testimony of record by the CHESLERS indicating that they were under the belief that SOUTH DADE was acting as agent for STADLER.

In *Fidelity and Casualty Co. of New York v. D.N. Morrison Construction Co. of Virginia,* 156 So.2d 385, 387 (Fla. 1934), the court cites the general rule that agency by estoppel has three primary elements: (1) a representation by the principal; (2) reliance on the representation by a third person; and (3) a change of position by the third person, in reliance upon such representation. The *Fidelity* court goes on to state that it is essential to application of the general rule that the following two important facts be clearly established: (1) "That the principal hold the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the persons dealing with the agent knew of the facts, and acting in good faith, had reason to believe that the agent possessed the necessary authority." *Fidelity* at 387.

Appellant states the general rule and asserts that "joint procurement and negotiation of the contract, the cooperative signature and agreement as to the real estate commission on the Purchase and Sale Contract, and the joint participation at the meeting on February 24, 1980" is sufficient evidence to create such agency.

The very case that Appellant relies upon is very specific in prescribing the evidence necessary to find such agency. Appellant has not shown, nor does the record show that STADLER held out SOUTH DADE as its agent to the public, nor does the record show that STADLER knowingly permitted SOUTH DADE to act as having such authority. ROSALIE ELLIOTT'S testimony indicated that she was unaware of JOAN GRADY of SOUTH DADE'S waiver until the trial. (T.90,99). ROSALIE ELLIOTT testified that she did not give JOAN GRADY the authority or permission to waive STADLER'S right to the deposit. (T.97). There was no evidence to the contrary presented and the trial court accepted MISS ELLIOTT'S testimony as competent evidence.

Joint participation in procurement and negotiation of the contract, and joint participation at the February 24, 1980 meeting would indicate the converse of what Appellant asserts; that is that SOUTH DADE was not acting as agent for STADLER but rather that each realty was acting on its own behalf.

The record fails to show a representation by STADLER that SOUTH DADE was its agent, fails to show that the CHESLERS relied on a representation, and fails to show a change in position by the CHESLERS in re-

liance on STADLER'S representation. The record does indicate, however, that the CHESLERS' change in position was in reliance on MR. APPLESTEIN'S advice and judgment, (T.106,52) and that he authored the waiver of deposit addendum to the sales contract. (T.51).

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CONCLUSION

Petitioner has not shown that this decision of the United States Court of Appeals for the Eleventh Circuit is in conflict with a decision of another court of appeals. Petitioner has also not shown that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the trial court so as to warrant the exercise of this Court's jurisdiction.

WHEREFORE, Respondent respectfully requests that the Supreme Court of the United States deny the petition for certiorari.

Respectfully submitted,

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